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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-288

MELVIN B. LAIRD,
SECRETARY OF DEFENSE, *et al.*,
Petitioners,

v.

ARLO TATUM, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF A GROUP OF FORMER ARMY INTELLIGENCE AGENTS, *AMICI CURIAE*

BURKE MARSHALL
Yale Law School
New Haven, Connecticut 06520

ARTHUR R. MILLER
Harvard Law School
Cambridge, Massachusetts 02138
Attorneys for Amici Curiae

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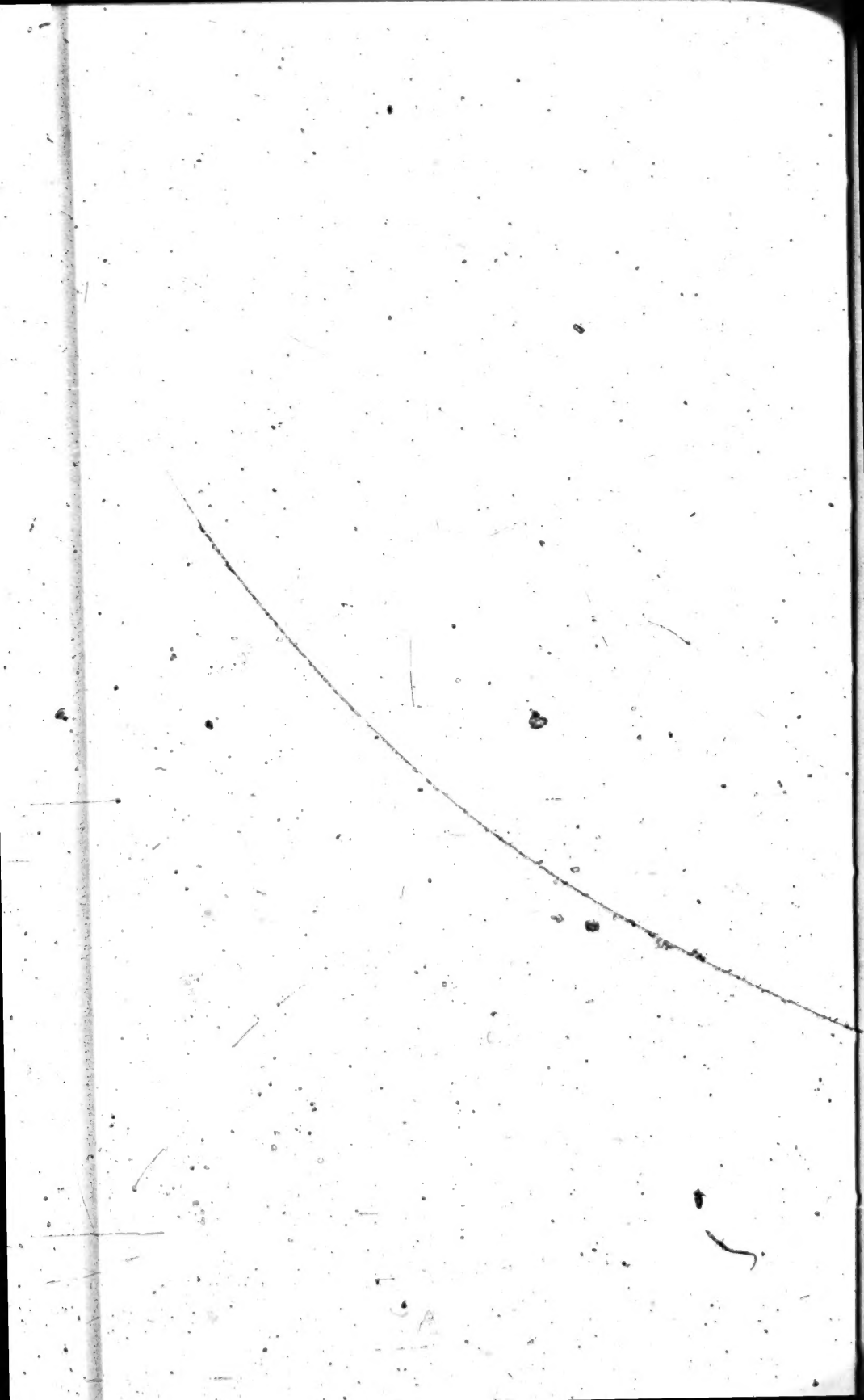

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Congressional Hearings:

Federal Data Banks, Computers and the Bill of Rights. Hearings before the Subcommittee on Constitutional Rights, Committee on the Judiciary, U.S. Senate, 92nd Cong., 1st Sess. (1971) . . . . . *passim*

Hearings Before Special Subcommittee to Inquire Into the Capability of the National Guard to Cope With Civil Disturbances. Committee on Armed Services, U.S. House of Representatives, 90th Cong., 1st Sess. (1967) 22, 25

United States Constitution:

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INTEREST OF THE *AMICI**

The *amici curiae* are a group of former officers and enlisted men who served in military intelligence from 1963 to 1971. Since January 1970 members of the group have endeavored to persuade the Government to undertake a complete reform

*This brief is filed with the consent of the parties. The letters of consent have been filed with the Clerk of the Court.

of the military's practice of monitoring civilian political activity.

While on active duty, all but a few of the *amici* were personally involved in the Army's surveillance and data-keeping. Some were action officers in the Army Operations Center during the riots and demonstrations of 1967, 1968, and 1969. Others attended demonstrations, rallies, marches, and church meetings, and wrote reports on the political activities of persons and groups unassociated with the armed forces or civil disorders. Some served as domestic intelligence analysts, maintained data banks, and read and wrote reports on "dissident," "militant," "extreme right-wing," and "leftist" activity. Still others personally infiltrated law-abiding civilian groups. Those not directly involved in the Army's domestic intelligence operations were legal instructors at the Army Intelligence School. Brief descriptions of each of the *amici* are set forth on pages 27-30, *infra*. All were honorably discharged; most hold commendations or medals for their service.

The *amici curiae* have undertaken to bring about basic reforms in the practices of Army intelligence because they are convinced that much of what they and their fellow agents were ordered to do served no useful purpose, exceeded the Army's mission, and caused many people to alter or abandon lawful modes and objects of political expression. Accordingly, they have endeavored to bring their knowledge, expertise, and judgments to the attention of the appropriate authorities in the Department of Defense, Congress, and the courts. Some have written articles, testified in court, appeared before Senate and executive branch inquiries, furnished information to the news media, and drafted legislation. Their disclosures form the basis of this lawsuit (App. 10, 13-43) and the hearings of the Senate Subcommittee on Constitutional Rights and have thus led to some of the recent reforms, such as the June 9, 1970 directive attached to the Petitioners' brief (45-51).

The *amici* have personal interests in the outcome of this litigation. Like the plaintiffs, they fear misuse of political and personal data in Army files, some of which pertain to their own lawful political activities. They have seen several of their number who agree with this brief decide that it would not be prudent for them to add their names to it. Despite these fears, they have endeavored to remain friendly critics of their former organization and to present an even-handed analysis of its needs, authority, and operations.[1] Most would not hesitate to volunteer in time of national emergency for further service in military intelligence. At the same time they believe that a judicial determination of the proper limits of the Army's domestic intelligence mission is urgently needed to protect them and their former colleagues from again having to choose between obeying orders and keeping their oath to uphold the Constitution.

QUESTIONS PRESENTED

Because their ability to contribute to the resolution of this controversy derives primarily from their knowledge and understanding of the Army's domestic intelligence needs, authority, and operations, the *amici curiae* limit their arguments to two questions:

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[1] In attempting to promote constructive reform, the *amici curiae* have made no statements as to the Army's motives, but have confined their attention to the present and possible effects of military surveillance on civilians. They represent no one but themselves. In describing the surveillance and data-keeping, they have taken care that none of their disclosures could injure the national security, be of use to foreign intelligence agencies, reveal sensitive methods of operation, or jeopardize the identity of undercover agents.

For further information about the *amici curiae* and the role they have played in this controversy, see *Federal Data Banks, Computers and the Bill of Rights.* Hearings before the Subcommittee on Constitutional Rights, Committee on the Judiciary, U. S. Senate, 92nd Cong., 1st Sess. (1971).

I. Whether the plaintiffs have standing to sue,

A. Whether the complaint alleges a present infringement of First Amendment rights;

B. Whether the activities alleged are likely to have a chilling effect;

C. Whether the plaintiffs' stake is sufficient to assure adverseness; and

D. Whether plaintiffs' standing is reinforced by the overbreadth of the surveillance.

II. Whether this controversy is ripe for adjudication,

A. Whether this case was ripe for adjudication when filed; and

B. Whether this controversy is still ripe.

STATEMENT OF THE CASE

The *amici curiae* adopt the plaintiffs' statement of the case but wish to stress the following:

(1) This controversy concerns only the sufficiency of the plaintiffs' pleadings. As this Court has said, "in appraising the sufficiency of the complaint we follow . . . the accepted rule that a complaint should not be dismissed . . . unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45 (1957).

(2) Representations in the petitioners' brief as to the Army's domestic intelligence needs and authority are the subject of intense controversy and have yet to be established by any trial court. (*E.g.*, see pages 20-31, *infra*).

(3) At least in part because the District Court ruled that it could decide this lawsuit on the basis of affidavits alone, the operations of Army intelligence have been mischaracterized as "essentially no different from 'what a good newspaper reporter would be able to gather by attendance at public meetings and the clipping of articles from publications avail-

able on any newsstand.'" (Petitioners' brief, 15, citing App. 138). As Part I of the following argument will show, there is ample information in the record below and in the hearings of the Subcommittee on Constitutional Rights[2] to show that the allegations of the complaint are susceptible of proof, and that the trial court could find a resulting chilling effect on the exercise by the plaintiffs and others of their First Amendment rights.

(4) The Justice Department's statement of the case contains serious errors and omissions of fact concerning the timing and extent of recent Department of the Army directives and conveys the misleading impression that the overbroad and chilling activities of which the plaintiffs complain ended prior to the filing of this lawsuit or immediately thereafter. The views of the *amici curiae* regarding the continuance of Army surveillance of civilian political activity are set forth in Part II of the following argument.

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[2] *Federal Data Banks, Computers and the Bill of Rights.* Hearings before the Subcommittee on Constitutional Rights, Committee on the Judiciary, U. S. Senate, 92nd Cong., 1st Sess. (1971), Parts I-IV. Hereinafter cited as *Hearings.*

The Court may, of course, take notice of the Hearings and other public facts for the purpose of determining whether the claim of a chilling effect is sufficiently made out by the pleadings to require a full hearing by the trial court. The chilling effect of the military's surveillance on the exercise of First Amendment rights is at least in part a question of law to be determined by the court on the basis of judicially noticeable information as well as evidentiary material. See *Lamont v. Postmaster General*, 381 U. S. 301 (1965) and *Talley v. California*, 362 U. S. 60 (1960). The *amici* submit that the judicially noticable facts in this case are sufficient to establish the existence of an unconstitutional chilling effect as a matter of law, although the Court need not make such a finding in order to affirm the ruling below.

SUMMARY OF THE ARGUMENT

The plaintiffs have standing to bring this case because their complaint clearly demonstrates a logical nexus between the chilling effect which military surveillance of civilian political activity has upon the exercise of First Amendment rights and their status as targets of that surveillance. The complaint is specific about the nature of the infringement, the source of of the chill, and the status of the plaintiffs as parties in a position to be chilled.

The Justice Department's formulation of the chilling effect test, however, would require the plaintiffs and others similarly situated to show that the Army's surveillance had placed them in circumstances which would lead most men to abandon their First Amendment rights. Such a test would put the prospective plaintiff in an impossible dilemma: he cannot invoke his rights unless he is immobilized by fear, but if he really were immobilized by fear, he would not invoke his rights.

The proper test is not whether any particular person is chilled in fact, but whether under the circumstances the activities complained of would be likely to inhibit persons of ordinary courage, commitment, and vulnerability from exercising their First Amendment rights. If so, then the Court must examine the circumstances surrounding the plaintiffs to make certain that their stake in the outcome is sufficient to assure the adverseness upon which courts depend for the full development of issues. Without purporting to speak for the plaintiffs, the *amici curiae* submit that the plaintiffs have good reason to be chilled and to be motivated to litigate their challenge fully.

If the Court has any doubts about the plaintiffs' standing, these doubts should be resolved in their favor because of the unquestionable overbreadth of the activities challenged in this suit. As the complaint alleges and as witnesses before the Ervin hearings have confirmed, none of the activities complained of were ever authorized by the Constitution or

federal statute. The Justice Department's failure to produce any documentary proof that the surveillance was part of any authorized mission of the armed forces or served any of their legitimate informational needs further supports the plaintiffs' allegations of overbreadth and underlines the importance of allowing them standing to sue.

This litigation is ripe for adjudication. Contrary to the to the Justice Department's representations, it was ripe at the time this lawsuit was filed and has not been rendered moot by the various directives cited in the Department's brief—all of which were issued after the filing of this suit. Whether the recent directives are appropriate to the task and whether they have in fact been obeyed are questions which only a trial court can resolve and, as the papers in this case and the Ervin hearings show, the sufficienoy of these purported reforms is the subject of intense controversy.

Moreover, even if the Justice Department could prove that administrative measures have finally stopped the activities complained of, this controversy still would not be moot, because the Army reserves the right to resume the surveillance and data-keeping whenever it sees fit.

I.

PLAINTIFFS HAVE STANDING TO SUE

"The 'gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Baker v. Carr*, 396 U.S. 186, 204 (1962).

Whether the plaintiffs have the requisite personal stake in the outcome depends upon the circumstances of the particular case. *Flast v. Cohen*, 392 U.S. 83, 101 (1968). Those circumstances must show that there is "a logical nexus between the status asserted by the plaintiffs and the precise

nature of the constitutional infringement alleged." *Id.*, at 102. The *amici curiae* submit that the plaintiffs have demonstrated the existence of a logical nexus between the infringements alleged in their complaint and their status as targets of the surveillance and as members of the class they seek to represent.

A. The Complaint Alleges a Present Infringement of First Amendment Rights

Paragraph 15 of the plaintiffs' complaint (App. 10) specifically alleges:

> The purpose and effect of the collection, maintenance and distribution of the information on civilian activity described herein is to harass and intimidate plaintiffs and others similarly situated, and to deter them from exercising their rights of political expression, protest, and dissent from government policies which are protected by the First Amendment by invading their privacy, damaging their reputations, adversely affecting their opportunities for employment, and in other ways.

In paragraph 17 of their complaint (App. 11), the plaintiffs charge:

> The conduct of the defendants described herein deprives plaintiffs and persons similarly situated of the rights of free speech and association, the right to petition their government for redress of grievances, and the right of privacy guaranteed and protected by the First, Fourth, Fifth and Ninth Amendments to the Constitution of the United States, and deprives all Americans of basic First Amendment rights by inhibiting and curtailing free and open discussion of issues of public importance.

The specific actions of the Army which constitute the source of the chilling effect are set forth in the complaint in considerable detail. Plaintiffs allege that the defendants "are engaged in the surveillance of lawful and peaceful civilian political activity within the United States" (App. 8), that data on these activities has been collected by a variety of

means, including the use of anonymous informants and electronic equipment (App. 10), stored in computerized and non-computerized records systems (App. 9-10), distributed indiscriminately over military teletypes (App. 9), and published in a blacklist" (App. 9).

Exhibit A to their complaint is a "Weekly Intelligence Summary" which dramatically demonstrates the scope and depth of the Army's interest in lawful and peaceful political activity unrelated to its civil disturbance and military security missions (App. 13-21). Exhibit B (App. 22-43) is an article by Christopher H. Pyle, a former captain in Army intelligence and one of the *amici curiae*, which states (App. 23):

> . . . Today, the Army maintains files on the membership, ideology, programs, and practices of virtually every activist political group in the country. These include not only such violence-prone organizations as the Minutemen and the Revolutionary Action Movement (RAM), but such non-violent groups as the Southern Christian Leadership Conference, Clergy and Laymen United Against the War in Vietnam, the American Civil Liberties Union, Women Strike for Peace, and the National Association for the Advancement of Colored People.

Captain Pyle also disclosed the use of undercover agents to infiltrate civilian groups and the unauthorized invasion of confidential student files (App. 23-24).

At the hearing in the District Court, the plaintiffs offered to substantiate their allegations with witnesses, one of whom had infiltrated a coalition of church groups in Colorado (App. 122-123, 125-26).[3] Judge Hart, however, refused to

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[3] "MR. ASKIN [counsel for plaintiffs]: Your honor, he will testify that he was instructed to infiltrate a group known as the Young Adults. Project, an organization composed of a number of church groups in the Colorado Springs area which also included the participation of the Young Democratic organization . . . ." Transcript of the Proceedings, *Tatum v. Laird*, Civil Action No. 459-70, D.C.D.C., April 22, 1970, at 29. Quoted in Respondents' Brief in Opposition, 10.

hear any witnesses on the ground that affidavits were a sufficient basis on which to decide the plaintiffs' motion for a preliminary injunction and the defendants' motion to dismiss (App. 123-24).

B. The Activities Alleged Are Likely to Have a Chilling Effect

The chilling effect doctrine provides that "inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government." *Lamont v. Postmaster General*, 381 U.S. 301, 305 (1965) (concurring opinion by Mr. Justice Brennan).

The Justice Department insists, however, that the activities alleged are somehow not chilling enough. Without ever clearly stating what the test is, the Department claims that the plaintiffs' allegations are insufficient because they do not show that the Army (1) made a "specific threat or imposition of legal or criminal penalties," (2) undertook to prosecute them, dismiss them from employment, or otherwise subject them to the force of a law before they could challenge it in court, (3) took unlawful inhibitory action, (4) misused, or specifically threatened to misuse, information about the plaintiffs to their detriment, or (5) compelled them to disclose their political beliefs or ideas (Petitioners' brief, 24, 25, 27, 41 n. 32, 24 respectively).

The *amici curiae* submit that even under this limited selection of relevant considerations, the plaintiffs' complaint states a claim for relief. Plaintiffs specifically charge unlawful action (App. 9-11), and specifically allege misuse of data through the indiscriminate circulation of reports which are made available to military, federal, and state agencies (App. 9-10).

The crux of the Department's argument, however, is that fear of a surveillance which serves no legitimate state interest is not sufficient to state a claim for relief—that the plaintiffs must prove in addition that the Army has taken, or has directly threatened to take, other adverse action against

them, or that the data has injured them in ways apart from the self-censorship it induces. To limit proof of the chilling effect to evidence of direct intimidation, of course, would be a total perversion of that doctrine and of common sense. As Mr. Justice Brandeis warned in *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (dissenting opinion):

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasions of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in the insidious encroachment by men of zeal, well-meaning but without understanding.

Similarly, it would make no sense to restrict the protection of the chilling effect doctrine to those persons who can prove that the inhibiting activity had already cost them their jobs, defamed their reputations, threatened them with prosecution, or directly confronted them with intimidating circumstances, such as demands that they divulge their beliefs or associations.

By either test, direct intimidation or harm in addition to intimidation, the Government would place all dissenters in the classic "Catch 22" dilemma: they can invoke their rights if they are immobilized by fear, but if they really were immobilized by fear, they would not invoke their rights.[4] To place such an onerous burden of proof on persons seeking to challenge an unauthorized, unnecessary, and chilling surveillance

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[4]The reference is to Joseph Heller's novel *Catch 22* (New York: Dell, 1961) in which the hero, a bombardier in the U. S. Army Air Force in World War II, asks to be relieved from flying any more missions on the ground that he is suffering from paranoid delusions. He explains that he thinks that everyone is trying to kill him. Everyone includes the Army which sends him up in airplanes and the Germans who try to shoot him down. His request is rejected. "There was only one catch and that was Catch-22, which specified that a concern for one's safety in the face of dangers that were real and immediate was the process of a rational mind . . . . All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions."

operation would be to immunize from judicial scrutiny all surveillance activities regardless of their potential for misuse or their effect on the willingness of persons to exercise their First Amendment rights and to engage in lawful political activity. Such a rule would simultaneously intensify the chilling effect and open the door to intelligence agents who might intentionally abuse their authority.[5]

The *amici curiae* object to this formulation of the chilling effect doctrine. The proper question for the court to ask when determining whether certain activities are likely to inhibit political activity is not whether any particular person has in fact been deterred, but whether it is reasonable to conclude from all the circumstances that people may be deterred.

In making this determination, judges must be careful not to substitute their circumstances for those of the class likely to be chilled. What may not seem intimidating to a judge may well be chilling to a private citizen with limited resources who seeks lawfully to advance a controversial idea. This is not to say that the court should analyze the risks of surveillance from the distorted perspective of a dissenter with paranoid delusions. At the same time it should not proceed on the assumption that all dissenters are as courageous as Patrick Henry or Samuel Adams. The chilling effect doctrine exists to protect men and women of ordinary courage and commitment, with the ordinary vulnerabilities of family, debts, limited mobility, and a status to maintain.

Thus, in determining the sufficiency of the plaintiffs' complaint, the fundamental question before the court is whether the activities alleged could inhibit persons of ordinary courage, commitment, and vulnerability. If so, then a valid claim of infringement of First Amendment rights has been alleged and the court can turn to the separate question of whether

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[5] As Army General Counsel Robert E. Jordan, III, warned: "I do think it is dangerous to create too much capability in this field. The guy who (runs such an apparatus) for the first couple of years may be okay, but you never can tell who's coming after him." Washington *Sunday Star*, Dec. 6, 1970. Reproduced in *Hearings*, Part I, p. 1728.

the plaintiffs' stake in the outcome is sufficient to assure adverseness and the proper development of issues common to the class they seek to represent.

C. Plaintiffs' Stake in the Outcome is Sufficient to Assure Adverseness

To establish a logical nexus between their status and the infringement alleged, the plaintiffs must establish that they are targets of the surveillance and that the risks attendant to that status give them a sufficient stake in the outcome of the litigation to assure the adverseness upon which courts depend for the full development of issues.[6]

1. *Plaintiffs allege that they are targets of the surveillance.* The complaint specifically alleges that the plaintiffs have been the subjects of Army intelligence reports (App. 9). One of those reports is attached as Exhibit A to the complaint (App. 13-31). The report purports to describe, and in some instances to characterize unfavorably, the political activities of certain plaintiffs as well as many other individuals and organizations. Thus, for example, the Rev. Albert Cleage is said to have spoken "to an estimated 100 persons at the

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[6] As this Court explained in *Flast v. Cohen, supra,* at 100, the purpose behind the adverseness requirement is to protect the courts from having to decide political questions, answer hypothetical or abstract inquiries, or make rulings on the basis of arguments that are friendly, feigned, or collusive. Here the plaintiffs are not public officials seeking advisory opinions; they are private citizens and organizations seeking declaratory and injunctive relief against government actions which they believe unconstitutionally raise the cost of political dissent. Their complaint does not raise hypothetical questions about imagined contingencies; it alleges present loss of First Amendment rights through a self-censorship forced by an intimidating system of surveillance and record-keeping. The self-censorship is alleged to derive from fear for their privacy, for their reputations, and for their employment and opportunities for employment (App. 10). Finally, any lawsuit which pits the War Resisters League against the Defense Department and ACLU attorneys against the Internal Security Division of the Justice Department can hardly be regarded as friendly, collusive, or feigned.

Emmanuel Methodist Church . . . on the topic of black unity and the problems of the ghetto." (App. 17). Conrad Lynn, a black lawyer who "replaced Yale Chaplain William Sloane Coffin as the principal speaker" at a meeting at the First Unitarian Church of Philadelphia (App. 17), was characterized as "an author of draft evasion literature." (App. 17). Although the Justice Department claims (Petitioners' brief, 32) that the Army's activities were "'directed primarily at ascertaining information needed to prepare appropriate levels of alert for military forces and needed by military commanders if they are directed to act' (App. 70)," in no instance was any of the plaintiffs reported to have violated a law, advocated violence, or threatened military security.

Captain Pyle's article, reproduced as Exhibit B to the plaintiffs' complaint (App. 22-43), not only described the Army's system for monitoring and keeping files on "virtually every activist political group in the country" (App. 23); it also linked that surveillance to one of the plaintiffs. "Thus an IBM card prepared . . . for the . . . computer file of Arlo Tatum, executive secretary of the Central Committee for Conscientious Objectors, contains a single notation—that Mr. Tatum delivered a speech at the University of Oklahoma on the legal rights of conscientious objectors." (App. 26).

2. *Targeting puts the plaintiffs in jeopardy.* As the plaintiffs allege in their complaint (App. 10-11) their stake in the outcome of this litigation is nothing less than:

> a. their Constitutional right to speak, assemble, and petition their government free from fear of the purposes or effects of the Army's surveillance, reports, and data banks.
>
> b. their right of individual and organizational privacy, which includes freedom from the unwarwanted intrusions of anonymous informants and undercover agents and the effects of unauthorized government reports and actions which invade their political, personal, and organizational life.

However, because the plaintiffs were not allowed to present any testimony in the District Court, the record of this case is not as explicit as it might be as to how these stakes are placed in jeopardy.

The *amici curiae* cannot speak for the plaintiffs, but their personal experience does qualify them to advise this Court as to why parties in the plaintiffs' position ought to feel a strong stake in the outcome of this litigation and want to pursue it vigorously. To support their analysis, the *amici curiae* draw wholly from information on the public record which would be likely to influence the plaintiffs and persons and groups similarly situated. They ask the Court to take judicial notice of this information not because it may be true (a judgment which must be made by the District Court), but because it is the kind of information which responsible people rely on daily to anticipate the likely consequences of their political conduct.

There are at least four good reasons why parties like the plaintiffs should seek the declaratory and injunctive relief requested. First, it is clear that the reports cited in the record below are not the only reports which the Army had on the plaintiffs and others like them. A "Weekly Intelligence Summary" (App. 13-21) is by definition a digest of more extensive reports supplied by Army agents, the Federal Bureau of Investigation, state and municipal police departments and other sources. The magnitude of the collection effort is suggested both by Mr. Pyle's article (App. 22-43) and by the testimony of former agents before the Ervin subcommittee. Examples of some of these other intelligence reports have appeared in the press[7] and are reproduced in the record of the Ervin hearings.[8] The comprehensive nature of the surveillance also is graphically demonstrated by the various "domestic intelligence collection plans" under which

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[7] *E.g., New York Post,* Jan. 4, 1971, p. 3; *New York Times,* Jan. 18, 1971, p. 22; *New York Times,* Jan. 29, 1971, p. 10.

[8] *Hearings,* Part I, pp. 239-242.

they were carried out. These plans also have been made public.[9] Thus individuals and groups like the plaintiffs have good cause to fear that the Army's reports contain far more damaging information about them than might first appear from examining the particular report reproduced as Appendix B to the complaint in this case. Obviously, the plaintiffs cannot be expected to detail such information in their complaint. In this case as in others, that is the function of discovery.

Second, the intelligence summary appended to the complaint begins with a standard "distribution list" (App. 13-14) which indicates that such reports were, as the plaintiffs allege, "regularly, widely, and indiscriminately circulated. . . ." (App. 9).[10] The swapping of such reports with the FBI, state and municipal police departments, and even the Central Intelligence Agency is now a matter of public record.[11] Thus the possibility that Army reports will be used (intentionally or not) in ways that injure the reputations of law-abiding dissenters has been multiplied many times over; literally tens of thousands of federal, state, and military personnel have seen these reports and have had access to the files in which they are stored.

Third, it is widely known that Army intelligence did not collect all of its information by clipping newspapers. Exhibit

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[9] *Hearings*, Part I, pp. 1119-1138, 1154-56, Part II, pp. 1734-37. See also *Cong. Rec.*, May 26, 1971, S7845-46.

[10] Routine recipients of weekly domestic intelligence summaries included the Army Operations Center, the Continental Army Command, the U. S. Strike Command, the Army Materiel Command, the Air Defense Command, each of the Continental armies, the XVIII Corps, Military District of Washington, 1st Armored Division, 2nd Armored Division, the Strategic Communications Command, Fort Devens, Mass., the Defense Intelligence Agency, and at least 34 headquarters and region offices of the Army Intelligence Command. Overseas commands receiving copies of this report included commands in Europe, Alaska, Hawaii, and Panama (App. 13-14).

[11] *Hearings*, Part I, pp. 129, 162, 171-82, 187, 224, 267-71, and 292.

B to the plaintiffs' complaint (App. 23) and their offer of testimony before Judge Hart (App. 125) both refer to covert operations. Since then, many more such operations have come to light. For example, according to former agents who testified before the Ervin hearings, Army intelligence

(1) assigned a team of agents to stake-out the grave of the late Rev. Martin Luther King (*Hearings*, 196).

(2) followed the Poor People's Campaign and their mules all the way to Washington, D.C. (*id.*, 197).

(3) infiltrated undercover agents into Resurrection City (*id.*, 197-98).

(4) maintained a command post inside and had agents on the floor of the 1968 Republican National Convention in Miami (*id.*, 198-99).

(5) had an agent from the Office of the Assistant Chief of Staff for Intelligence on the floor of the 1968 Democratic National Convention in Chicago (*id.*, 200).

(6) posed as press photographers and newspaper reporters, sometimes with bogus press credentials (*id.*, 185).

(7) infiltrated the headquarters of the National Mobilization Committee to End the War in Vietnam (*id.*, 201).

(8) posed as students to monitor classes in the Black studies program at New York University during the summer or fall of 1968 (*id.*, 296).

(9) posed as television newsmen and taped interviews with demonstrators in Chicago during the 1968 Democratic National Convention (*id.*, 200-01).

(10) kept card files, dossiers, and photographs on students and faculty at the University of Minnesota (*id.*, 155).

(11) infiltrated the Colorado Springs Young Adults Project (a coalition of church youth groups), mon-

itored an anti-war vigil inside the Chapel of Colorado College, and sent plainclothes agents to attend meetings of the Colorado Springs anti-poverty board (*id.*, 306, 310-12).

(12) conducted vehicular and foot surveillance of the Revs. Jesse Jackson and Ralph Abernathy during the Democratic National Convention of 1968 (*id.*, 200).

(13) shadowed Gov. Lester Maddox and his Georgia delegation to the same Convention (*id.*, 199-200).

Given the scope of these covert operations and the variety of individuals and groups watched, the *amici curiae* submit that parties like the plaintiffs have good reason to fear invasions of their privacy.

Finally, there have been a number of well publicized accounts of instances in which military intelligence reports have been misused. For example, reports are said to have been

(1) taken from the Intelligence Command's highly inaccurate civil disturbance teletype and filed in Army dossiers on persons who have held, or were being considered for, security clearances, thus contaminating what are supposed to be investigative reports with unverified gossip and rumor. This practice directly jeopardized the employment and employment opportunities of persons seeking sensitive positions with the federal government or defense industry (*id.*, 229-30).

(2) leaked to the press to impugn the mental stability of a state law enforcement official (App. 38).

(3) cited to cast doubt on the loyalty of a candidate for Congress.[12]

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[12] *New York Times*, Oct. 27, 1954, p. 17; Oct. 28, 1954, p. 29 (Navy reports).

(4) turned over to a private anti-Communist crusader in the business of identifying "subversives" to Congressional committees and others.[13]

(5) compiled to help a private employer find grounds to fire an unwanted employee.[14]

The foregoing facts provide but a tiny glimpse of the dangers inherent in the Army's political data banks. As a matter of law, however, they are more than sufficient to warrant rejection of the Justice Department's claim that no state of facts could be proved which would support the plaintiffs' allegation of a present inhibiting effect on their willingness to exercise First Amendment rights.[15]

D. Plaintiffs' Standing Is Reinforced by the Overbreadth of the Surveillance

The plaintiffs specifically allege (App. 11) that the Army's domestic intelligence program "exceeds the lawful needs and authority of the United States Army and is without any lawful statutory authority." In other portions of the complaint,

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[13]Richard Halloran, "Senate Panel Holds Vast 'Subversives' File Amassed by Ex-Chief of Army Intelligence," *New York Times*, Sept. 7, 1971, p. 35. Reproduced in *Hearings*, Part II, pp. 1722-26.

[14]Morton Kondracke, "Investigate charges of business use of Army spies," *Chicago Sun-Times*, May 16, 1971, p. 14. Jared Stout, "Army Punishes Three Officers for Misusing Intelligence," *Philadelphia Inquirer*, July 21, 1971. Reproduced in *Hearings*, Part II, p. 1767.

[15]The Department of Justice rests much of its argument that the plaintiffs lack standing on a remark made by one of their co-counsel that plaintiffs "are not people, obviously, who are cowed and chilled." (Petitioners' brief, 16, 36.) The statement is taken out of context. Read in the context of the pleadings, offers of proof, and oral argument, it is nothing more than an imprecise acknowledgement that the plaintiffs are not so totally cowed and chilled that they will abandon all of their rights, including recourse to the courts. Needless to say, the sufficiency of a complaint cannot be made to turn solely on the basis of one imprecise statement made in the heat of oral argument. All of the allegations and all of the facts likely to be proved must be considered together in a light most favorable to the plaintiffs.

in the annexed exhibits, and in offers of proof to the District Court, they detail the ways in which the surveillance exceeded the Army's legitimate needs and authority, *e.g.*, through the use of anonymous informants (App. 9, 23-24), undercover agents (App. 23), covert infiltration of civilian organizations (App. 125), compilation of blacklists (App. 9), storage of information on civilians in Army data banks (App. 9-10, 25-26), and the "indiscriminate" dissemination of reports about the plaintiffs (App. 9).

These allegations indicate that the Army's surveillance of civilian political activity is overbroad in both a constitutional and statutory sense. Accordingly, any doubts as to the plaintiffs' standing to maintain this action should be resolved in their favor. As Mr. Justice Frankfurther noted in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 156 (concurring opinion): "standing to challenge official action is more apt to exist when that action is not within the scope of official authority than when the objection to the administrative decision goes only to its correctness."

1. Surveillance and data-keeping are unauthorized.[16] None of the seven provisions of the United States Code which define the Army's domestic role authorizes the collection of political and private data on civilians.[17] Indeed, the plain

[16] Were they authorized by statute, of course, they would still be unconstitutional.

[17] They are 10 U.S.C. Sections 331, 332, and 333 (defining the conditions under which the President may direct troops to assist overburdened civilian authorities to restore order, execute laws, and enforce court orders), 10 U.S.C. Section 334 (requiring the issuance of a Presidential proclamation before troops may be deployed under Sections 331-333), 18 U.S.C. Sections 592 and 593 (making it a crime to use troops at polling places or to influence elections), and 18 U.S.C. Section 1385 (providing criminal penalties for subordinate commanders who direct military personnel to execute the civil laws or serve in a posse comitatus without a direct order from the President acting pursuant to a Constitutional or statutory authorization). None of these provisions authorizes the massive surveillance complained of in this case. Nor is there any evidence in the legislative history of these

meaning of the posse comitatus act of 1878 (18 U.S.C. Sec. 1385) would appear to forbid the use of soldiers as municipal detectives or para-policemen. It provides criminal penalties for "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully *uses any part of the Army* or the Air Force as a posse comitatus or otherwise *to execute the laws* . . . ." [Emphasis added]. Moreover, the requirement of 10 U.S.C. Sec. 334 that the President first issue a proclamation before deploying riot troops would appear to rule out the deployment of plainclothes soldiers in advance of regular units.[18]

2. *Surveillance of civilians is not part of the civil disturbance mission.* The Department of Justice seeks to justify the surveillance of individuals (even as it claims to have curbed it) by equating the Army's civil disturbance mission with that of the local police (Petitioners' brief, 32-33). However, troops are not policemen and Army intelligence agents are not city detectives. The Army's job is to deal with rioting masses, not isolated individuals. When a person commits a crime, such as arson or looting, in the presence of riot troops they may detain him for arrest and prosecution by civilian authorities in civilian courts. Their authority for such action is akin to the power of citizen's arrest, by which any person has the authority to detain a person whom he observes commiting a felony or a breach of the peace.[19] But soldiers on riot duty do not

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statutes and their use in times of civil disorder that any President or Attorney General has ever tried to stretch their meaning to warrant such activity.

[18] The surveillance and data-keeping also appear to violate the Delimitations Agreement of 1949 (Army Regulation 380-115). By that agreement Army intelligence explicity conceded that the FBI had exclusive jurisdiction to investigate civilians unaffiliated with the armed forces or defense industry who were suspected of posing a risk to internal security.

[19] According to the Kerner Commission, for example, only seven states have laws granting National Guard troops the arrest powers of police officials. *Report of the National Advisory Commission on Civil Disorders* (New York: Bantam Books ed., 1968), p. 526.

have the authority to investigate crime, track down conspirators, apply for arrest and search warrants, or otherwise execute the criminal law. They are an order-keeping force. They may direct traffic, guard buildings, enforce curfews, and disperse rioters, but they may not function as policemen or detectives until a state or martial law is declared by the President.[20]

Were the surveillance and data-keeping truly considered by the responsible civilian officials to be part of the Army's legitimate civil disturbance mission, the Department of Justice undoubtedly would be able to produce directives signed by the President or the Secretaries of Defense and Army authorizing it. However, the one directive which the Department does cite (DoD Directive No. 3025.12, dated June 8, 1968) is a general mission-type assignment which says nothing about political surveillance or biographic or organizational data banks on dissenters (Petitioners' brief, 31).[21] To date,

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[20] The classic authority for this limited definition of the Army's role in civil disorders continues to be the Department of the Army Field Manual, FM 19-15: *Civil Disturbances and Disasters* (Washington, D. C.: U. S. Government Printing Office, 1952, 1968). It places heavy emphasis on the crowd control functions of federal troops and the primacy of civilian police officers in the apprehension of criminals. This is the role advocated by Cyrus Vance in his "after-action" report on Detroit and by virtually all military commanders who testified at *Hearings before Special Subcommittee to Inquire Into the Capability of the National Guard to Cope with Civil Disturbances.* Committee on Armed Services, U. S. House of Representatives, 90th Cong., 1st Sess., August 10, 11, 15, 22, 23, 24, 25, and October 3, 1967. None of the after-action reports presented to that subcommittee calls for organizational and personality files or blacklists on persons who someday might become involved in a civil disturbance.

[21] It says only that the Secretary of the Army shall be Executive Agent for the Department of Defense in ". . . Providing essential planning, operational, and intelligence data to the National Military Command Center (NMCC) and the military service command centers on a timely basis to ensure that the National Command Authorities and appropriate military service command authorities are adequately informed."

the Departments of Justice, Defense, and Army all have failed to produce any documentary proof that the President or his appointees ever authorized, or knew about, the kinds of operations which are the subject of the plaintiffs' complaint. How these operations were concealed from responsible civilian officials by military intelligence has been described in testimony before the Ervin hearings.[22]

3. *Surveillance and data-keeping are beyond the Army's needs.* The *amici curiae* submit that when the overbroad analogies to police work are stripped away, Army intelligence will be found to have five legitimate domestic intelligence needs:

(1) Generalized data, for planning purposes, on the patterns of past urban disorders and violent demonstrations which required federal troops. (Such data can be obtained from the after-action reports of task force commanders, Presidential representatives, the Department of Justice, and state and federal riot commissions).

(2) Physical reconnaissance data on potential riot and demonstration areas. (This information includes maps showing approach routes, potential bivouac sites, precinct stations, communications and command centers, and likely areas of disorders).

(3) Liaison information on local law enforcement agencies which may be needed by task force commanders for the purpose of coordinating riot control operations. (Virtually all of this information can be obtained during joint planning sessions and stored with the results of physical reconnaissance in "city packets." Should appraisals of the willingness of local authorities to enforce federal laws and court orders be required, these should be prepared by the Department of Justice).

(4) "Order of battle" type data on the location, size, and actions of rioting mobs in those cities to which federal troops

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[22] *Hearings*, Part I, pp. 202, 204, 216, 281, 282.

have been sent by the President pursuant to 10 U.S.C. Sections 331-334. (This kind of information can be gathered through liaison with local authorities, by uniformed military personnel on patrol, and by riot units stationed throughout the affected area. It does not require the use of plainclothes agents, blacklists, or biographic and organizational data banks).

(5) Information relating to the security of military installations, documents, and personnel. (Examples include reports of espionage, sabotage, unauthorized demonstrations on post, and attempts by civilians to persuade servicemen or civilian employees of the armed forces to disobey the Uniform Code of Military Justice or lawful orders or regulations. However, the conduct of off-post investigations of civilians for purposes not related to the granting of security clearances is properly the task of civilian authorities.)

The *amici curiae* know of no legitimate domestic intelligence need of the armed forces that requires military intelli- to

(1) infiltrate civilian organizations with informants or undercover agents. (The off-post investigation of crimes against the military is the duty of civilian law enforcement agencies).

(2) deploy plainclothes agents to observe demonstrations, conferences, labor union activities, political party conventions, or church meetings.

(3) monitor citizen's band radio transmissions.

(4) maintain card files, dossiers, photographic files, mug books, encyclopedias, and computerized biographic and organizational files on the political and private activities of civilians.

(5) operate nationwide civil disturbance monitoring networks for the purpose of anticipating a Presidential order to

deploy troops or to advise the President when troops should be deployed.[23]

The *amici curiae* raise these points to rebut serious misconceptions in the Justice Department's brief and to support the the plaintiffs' allegations of overbreadth. They wish to emphasize that all representations of the Army's legitimate informational needs and authority remain the subject of intense controversy and can only be resolved at an evidentiary hearing. They submit that the plaintiffs' allegations or overbreadth should be taken as true and any doubts as to their standing resolved in their favor.

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[23]It is the job of the President to tell the Army when to deploy; it is the job of State governors and the Attorney General to advise the President that troops are needed. It is the task of early warning units maintained by the Department of Justice and local and state police departments to tell their respective superiors when defiance of the law has gotten or threatens to get out of hand. According to former intelligence analysts who worked as action officers in the Army Operations Center during the riots and mass demonstrations of 1967, 1968, and 1969, the Army's two nationwide networks for monitoring civil disturbances were of no practical value. By the time an urban riot gets to the point where Federal troops may be required, it has been raging for many hours and has been well reported by the news media, teams of Justice Department lawyers, municipal and state police departments, and the National Guard. It should be noted that none of the civilian after-action reports on the riots of the late 1960s called for the creation of a nationwide Army intelligence network for monitoring demonstrations, labor disputes, church vigils, and similar events on the hypothesis that they might grow into a riot so large that Federal troops would be required to put it down. For responsible discussions of real needs, see generally *Hearings before Special Subcommittee to Inquire into the Capability of the National Guard to Cope with Civil Disturbances, op. cit.*, p. 18, n. 20. Nor has military surveillance of civil disorders ever been proposed by any riot commission in this century. The reports of these commission are summarized by Anthony M. Platt, *The Politics of Riot Commissions, 1917-1970* (New York: Collier, 1971).

II. THIS CASE IS RIPE FOR ADJUDICATION

Throughout its brief, the Justice Department attempts to convey the impression that recent Department of the Army directives have eliminated the overbroad aspects of the surveillance and record-keeping and have rendered this controversy not ripe for adjudication. The *amici curiae* respectfully submit that these statements and arguments are misleading and that any analysis of the extent or sufficiency of purported reforms goes to the question of how the remedy should be fashioned, which is a matter for the District Court to decide.

A. The Case Was Ripe for Adjudication When Filed

In its Statement of the Case, the Justice Department relies heavily on official claims of partial reforms to imply that this case was not ripe for adjudication when it was filed. The omission of important dates and the presentation of purported reforms out of chronological order gives the impression that the activities challenged here were substantially terminated prior to the filing of this lawsuit on February 17, 1970.[24] However, a close examination of the dates of each of the cited directives will show that all were issued after the filing of this lawsuit.[25] Far from establishing that this con-

[24] For example, Section 3 of the Justice Department's statement of the case (Petitioners' brief, 8) begins by depicting a downward trend in civil disturbance reporting from the summer of 1968 to some unspecified time when "[o]bservation of civilian political activities became 'limited to incidents where there [was] a high potential for violence and disorder growing beyond the capability of state and local police and the National Guard to control' (App. 85)." The reference cited, however, is a letter from Under Secretary Beal to Rep. Gallagher stating a new policy as of March 20, 1970—a month after this lawsuit was filed.

For a detailed account of the level of CONUS intelligence operations during this period, see Captain Pyle's testimony before the Ervin subcommittee, *Hearings*, Part I, pp. 156, 202-206.

[25] The proper chronology is:

—January 9, 1970, Captain Pyle's first article published.

(Continued)

troversy was not ripe at the time the complaint was filed, the directives confirm that civilian Pentagon officials agreed with the plaintiffs and the *amici curiae* that Army intelligence had

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–January 21-February 15, 1970. Secretary of the Army receives approximately 30 Congressional inquiries concerning the article.

–February 17, 1970. Plaintiffs file this suit.

–February 18, 1970. Letter from Assistant Chief of Staff for Intelligence to the Commanding General, U.S. Army Intelligence Command, orders destruction of blacklist and discontinuance of civil disturbance spot reports on incidents of only local or regional interest.

–February 19, 1970. Message from Assistant Chief of Staff for Intelligence to the Commanding General, U.S. Army Intelligence Command, directs destruction of all its computerized civil disturbance and biographic data. (Manual files not covered by this order.)

–February 26, 1970. Army General Counsel Jordan assures members of Congress that blacklist has been ordered destroyed and says "No computer data bank . . . is being maintained."

–February 28, 1970. Reports of Fort Monroe computer, CIAD's computer-indexed microfilm archive, and numerous regional and local hard-copy files published in the press.

–March 6, 1970. Secretary of the Army bans all civil disturbance computers and orders subordinates to find and destroy all of them. (Three more eventually discovered).

–March 12, 1970. Plaintiffs file motions for temporary restraining order and preliminary injunction alleging existence of Fort Monroe computer, CIAD's archive, the "Compendium," and scores of regional data banks.

–March 20, 1970. Under Secretary Beal assures Rep. Gallagher that in addition to the Intelligence Command's computer "The only other 'intelligence files' concerning civilians . . . [are] maintained by the Counterintelligence Analysis Division. Beal makes no mention of data banks cited in plaintiffs' March 12 motions.

–June 9, 1970. Letter by Acting Adjutant General to major stateside commands directs them to shift civil disturbance intelligence apparatus to a stand-by basis, gives a general control over its reactivation, orders persons in charge of regional and local data centers to be prepared to destroy or transfer files, and exempts surveillances for "military security" purposes from these requirements.

gotten out of hand and that aspect of its operations exceeded its mission. (*E.g.*, Jordan's letter, App., 54-55, Beal's letter, App. 81, and Beal's affidavit, App. 71-72.)

B. The Controversy is Still Ripe

The Justice Department also argues, somewhat inconsistently, that this controversy is no longer appropriate for judicial resolution because "the military domestic surveillance has been cut back sharply." (Petitioners' brief, 34.) The appeal is to judicial self-restraint; the implication, never explicitly stated, is that this case is moot.

1. *The issue of mootness can only be decided by the District Court.* Whether this case is moot is a question that only a trial judge can decide. The Justice Department's claims of a cut-back in the surveillance are challenged by the plaintiffs' motion papers[26] and have been widely criticized in the press[27] and in Congress.[28] Testimony by the *amici*

[26] For example, the Army General Counsel's letter of February 26, 1970 which claims that "No other computer data bank of civil disturbance information is being maintained . . ." (App. 55) is directly contradicted by the plaintiffs' motions for a temporary restraining order and a preliminary injunction filed on March 12, 1970. They alleged the existence of a computer data bank at Fort Monroe, Va., a microfilm archive at the Counterintelligence Analysis Division in northern Virginia, and scores of regional data banks around the country. Under Secretary Beal's letter to Rep. Gallagher dated March 20, 1970—eight days after the motions were filed—claimed that "The only other 'intelligence files' concerning civilians maintained by the Army [besides those at Fort Holabird] consist of the [microfilm] files maintained by the Counterintelligence Analysis Division." (App. 85.)

[27] *E.g.*, see "Army continuing its political intelligence operation," *Chicago Sun-Times*, March 15, 1970, p. 3; "Despite Denials, Army Sends Spies to Rallies," *Washington Evening Star*, March 28, 1970, p. 1 (*Hearings*, Part I, p. 1648); "Files of Army Spying on Civilians Intact, Say Ex-Agents," Boston *Sunday Herald Traveler*, Jan. 3, 1971, p. 15; "Order to Purge Intelligence Files of Some Civilians Is Rescinded," Baltimore *Evening Sun*, Jan. 28, 1971. A more extensive but by no means complete bibliography of press criticism of the Government's cut-back claims can be found in *Hearings*, Part 1, pp. 138-43.

curiae at the Ervin hearings indicates that what partial reforms have been attempted by the civilian hierarchy of the Pentagon have been met with widespread evasion by military intelligence.[29]

2. *Mere cessation of illegality does not establish mootness.* As this Court held in *Gray v. Sanders*, 372 U. S. 368 (1962):

> . . . the voluntary abandonment of a practice does not relieve a court of adjudicating its legality, particularly where the practice is deeply rooted and long standing. For if the case were dismissed as moot appellants would be 'free to return to . . . [their] old ways.' " *Id.* at 376.

The practices of which the plaintiffs complain are deeply rooted in secret programs of long standing. Army intelligence has been maintaining an unauthorized watch over civilian political activity for nearly 30 years.[30] Nor is this the

[28] *E.g., Cong. Rec.*, March 12, 1970, S3644-50; July 6, 1970 S10557-62; July 29, 1970, S12327-57; Dec. 18, 1970, H12092-103; Dec. 19, 1970, H12150-52; and *Hearings, passim.*

[29] *Hearings*, Part I, p. 156 (concealment of records); pp. 157-59 (intelligence reports showing continued collection activities during November and December 1970 in direct violation of June 9, 1970 directive); p. 160 (non-disclosure of files); p. 162 (continued data-swapping with state agencies as late as Nov. 1970); p. 281 ("blatant lying" by Army intelligence task group to civilian superiors charged by ex-member of group); p. 331 (circumvention of ban on storage of spot reports); p. 462 (Army General Counsel confirms that he was given false information by Army intelligence officers).

[30] Outside the Army, the best documentary evidence of these operations is contained in the private files of Gen. Ralph Van Deman (Ret.), who received military reports on civilian political activity from his former colleagues in Army intelligence throughout the 1940s and early 50s for use in his private anti-Communist crusade. Upon his death in 1952 these files were transferred to the Army. On March 2, 1971 the defendants transferred them to the Senate Internal Security Subcommittee. See Richard Halloran, "Senate Panel Holds Vast 'Subversives' File Amassed by Ex-Chief of Army Intelligence," *New York Times*, Sept. 7, 1971, p. 35. Reproduced in *Hearings*, Part II, pp. 1722-26.

first time that Army intelligence has, without notice to its civilian superiors, overstepped its mission. From 1917 to 1924, the Corps of Intelligence Police maintained a massive surveillance of civilian political activity which involved the use of hundreds of civilian informants, the infiltration of civilian organizations and the seizure of dissenters and unionists, sometimes without charges.[31] That activity was opposed —then as now—by civilian officials on those occasions when they found out about it,[32] but it continued unabated until post-war disarmament and economies finally eliminated the bureaucracy that conducted it.[33]

3. *The Army reserves the right to resume the surveillance.* On the one hand, the Army officials concede that the surveillance was beyond the Army's mission, but on the other they authorize the Director for Civil Disturbance Planning and Operations (a general) to reactivate it whenever he sees fit.[34]

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[31] These operations are meticulously reconstructed from the files of Army intelligence by Prof. Joan M. Jensen in *The Price of Vigilance* (Chicago: Rand McNally, 1968). See especially pp. 112, 274, 282, 244, 276, 279, and 226.

[32] For example, Maj. Omar Bradley was reprimanded by Justice Department officials for joining in a military intelligence raid on a union printing plant in Butte, Mont. The unionists, according to Prof. Jensen, were jailed without charges. *Id.*, p. 227. For other efforts to discipline Army intelligence, see *id.*, pp. 124, 231-32. Professor Jensen concludes: "The attempts at restraint by [President] Wilson, [Attorney General] Gregory, and [Secretary of War] Baker merely drove the Military intelligence underground." *Id.*, p. 124.

[33] *Id.*, p. 288.

[34] The directive of June 9, 1970 (Petitioners' brief, Appendix B, 45-51) does not forbid political surveillance. It merely provides that Army Intelligence shall not undertake it until the Director for Civil Disturbance Planning and Operations finds that "there is a distinct threat of a civil disturbance beyond the capability of local and State authorities to control." (Petitioners' brief, 47). No criteria, such as a governor's request for troops, are set forth to guide the Director in his determination. On the contrary, a "civil disturbance" is defined as any "situation in which a civil jurisdiction is required to apply a

Thus, even if the Justice Department could prove that the surveillance has been stopped and the records destroyed, the question would still remain whether the armed forces have the authority "to exercise a totally unrestricted investigative function in regard to civilians, divorced from the normal restrictions of legal process and the courts." (App. 147.)

Stripped of the specious claims of a nexus between the surveillance and the Army's statutory authority to help quell riots, this is a bald claim of inherent executive power. The courts have consistently rejected such claims in the past, *e.g.*, *Ex parte Milligan*, 71 U. S. 2 (1866), *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952, *United States v. U. S. District Court*, 444 F.2d 651 (6th Cir.) *cert.* granted, 403 U. S. 930 (June 21, 1971). This claim deserves to be rejected now.

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greater than usual degree of police enforcement in order to insure the maintenance of law and order." (Petitioners' brief, 45). Meanwhile, "Army Intelligence elements possessing counterintelligence resources will maintain the capability to collect civil disturbance threat information . . ." (Petitioners' brief, 47).

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be affirmed and the case returned to the District Court for a full evidentiary hearing.

Respectfully submitted,

BURKE MARSHALL
Yale Law School
New Haven, Connecticut 16520

ARTHUR R. MILLER
Harvard Law School
Cambridge, Massachusetts 02138

Attorneys for Amici Curiae

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Participating in the preparation of the brief:

Christopher H. Pyle
Burton Z. Alter
R. Joseph D'Avignon
Joseph J. Levin, Jr.
Ralph M. Stein

THE AMICI CURIAE

Burton Z. Alter, Esq.
Active duty: November 1965 to November 1967
Rank: Captain
Training: Counterintelligence agent
Unit: U.S. Army Intelligence School, Ft. Holabird, Maryland
Position: Legal instructor

Daniel J. Armet
Active duty: November 1965 to November 1967
Rank: Captain
Training: Counterintelligence agent
Unit: New York Field Office, Region I, 108th MI Group, New York City, New York
Position: Chief, Special Investigations Branch

Jerry L. Borman
Active duty: May 1968 to April 1971
Rank: Sergeant
Training: Counterintelligence agent
Units: Edwardsville (Ill.) Resident Office, Carbondale (Ill.) Resident Office, Chicago (Ill.) Field Office, Region I, 113th MI Group
Positions: Special agent (Edwardsville and Chicago), Special agent-in-charge, Carbondale

Quentin L. Burgess
Active duty: April 1967 to April 1969
Rank: First Lieutenant
Training: Counterintelligence agent
Unit: 116th MI Group, Washington, D. C.
Position: Team Chief, Personnel Security Investigations Division; part-time special agent for Special Operations Division

Thomas J. Charters
Active duty: April 1968 to April 1971
Rank: Staff sergeant

Training: Counterintelligence agent
Unit: Chicago Field Office, Region I, 113th MI Group, Chicago, Illinois
Position: Special agent, Special Investigations Branch

R. Joseph D'Avignon, Esq.
Active duty: July 1967 to July 1969
Rank: Captain
Training: Counterintelligence agent
Unit: U. S. Army Intelligence School, Ft. Holabird, Md.
Position: Legal instructor

Richard Dolan
Active duty: August 1966 to July 1968
Rank: First lieutenant
Training: Counterintelligence agent
Unit: Field Office, Region I, 108th MI Group, New York, New York
Position: Special agent

Dennis E. Flannery
Active duty: February 1967 to September 1970
Rank: Staff sergeant
Training: Counterintelligence agent
Unit: 771st MI Detachment, San Juan, Puerto Rico
Position: Special agent and Spanish linguist

Allen G. Gibbs
Active duty: September 1965 to September 1968
Rank: Sergeant
Training: Counterintelligence agent
Unit: Ft. Lewis Field Office, Region III, 115th MI Group, Ft. Lewis, Washington
Position: Special agent

J. Peter Gonigam
Active duty: January 1968 to January 1971
Rank: Specialist (Fifth Class)
Training: Counterintelligence coordinator
Units: HQ, 113th MI Group, Ft. Sheridan, Illinois, HQ, Region V, 113th MI Group, Minneapolis, Minnesota;

and the Twin Cities Field Office, Region V, 113th MI Group, Minneapolis, Minnesota
Positions: Coordinator of personnel security investigations; teletype operator

Eric J. Groves, Esq.
Active duty: November 1964 to November 1966
Rank: First Lieutenant
Training: Counterintelligence agent
Unit: HQ, Region VII, 112th INTC Group, Oklahoma City, Oklahoma
Position: Special agent

Craig P. Hall
Active duty: March 1968 to July 1971
Rank: Staff sergeant
Training: Counterintelligence agent
Unit: Counterintelligence Analysis Division, Office of the Assistant Chief of Staff for Intelligence, Washington, D. C.
Position: Domestic intelligence analyst

Peter Hoagland, Esq.
Active duty: September 1963 to July 1965
Rank: First lieutenant
Training: Counterintelligence agent
Unit: 116th MI Group, Washington, D.C.
Position: Special agent, Special Investigations Division

David R. Johnson
Active duty: February 1966 to February 1969
Rank: Sergeant
Training: Counterintelligence agent
Unit: HQ, 116th MI Group, Washington, D. C.
Position: Special agent assigned to Special Operations Division

Richard A. Kasson
Active duty: February 1967 to February 1970.
Rank: Sergeant
Training: Counterintelligence agent

Unit: Twin Cities Field Office, Region V, 113th MI Group, Minneapolis, Minnesota
Position: Special agent, Special Investigations Branch

Laird Klingler
Active duty: August 1968 to August 1971
Rank: Sergeant
Training: Counterintelligence agent
Unit: Peoria Resident Office, Region I, 113th MI Group, Peoria, Illinois

Carlton Munro Lake, Jr.
Active duty: January 1966 to January 1969
Rank: Sergeant
Training: Counterintelligence agent
Unit: New York Field Office, Region I, 108th MI Group, New York City, New York
Position: Special agent

Laurence F. Lane
Active duty: June 1968 to June 1970
Rank: Sergeant
Training: Infantryman
Unit: 5th MI Detachment, 5th Infantry Division (Mechanized), 5th U. S. Army, Ft. Carson, Colorado
Position: Domestic intelligence analyst

Joseph [redacted] Levin, Jr., Esq.
Active duty: January 1967 to January 1969
Rank: First Lieutenant
Training: Counterintelligence agent
Unit: New York Field Office, 108th MI Group, New York City, New York
Position: Special-agent-in-charge

Thomas C. Lewis
Active duty: July 1963 to May 1966
Rank: Staff sergeant
Training: Counterintelligence agent
Unit: Dayton Field Office, Region IV, 113th MI Group, Dayton, Ohio
Position: Special agent

Oliver A. Peirce
Active duty: September 1968 to December 1969
Rank: Corporal
Training: Counterintelligence agent
Unit: 5th MI Detachment, 5th Infantry Division (Mechanized), Ft. Carson, Colorado
Position: Special agent

Christopher H. Pyle
Active duty: August 1966 to July 1968
Rank: Captain
Training: Counterintelligence agent
Unit: U.S. Army Intelligence School, Ft. Holabird, Maryland
Position: Legal instructor

Michael R. Schliessman
Active duty: October 1967 to August 1970
Rank: Specialist (Fifth Class)
Training: Intelligence coordinator
Units: HQ, 113th MI Group, Ft. Sheridan, Illinois; HQ, Region V, 113th MI Group, Minneapolis, Minnesota; Twin Cities Field Office, Region V, 113th MI Group, Minneapolis, Minnesota
Position: Coordinator of personnel security investigations at all of the above offices

George Schroeder
Active duty: July 1967 to August 1969
Rank: Captain
Training: Counterintelligence agent
Unit: 116th MI Group, Washington, D.C.
Position: Special agent

Robert E. Shluker
Active duty: October 1965 to October 1968
Rank: Sergeant
Training: Counterintelligence agent
Unit: Brooklyn Field Office, Region I, 108th MI Group, Brooklyn, New York
Position: Special agent

Edward D. Sohier
Active duty: October 1967 to August 1970
Rank: Specialist (Fifth Class)
Training: Counterintelligence coordinator
Unit: Counterintelligence Analysis Division, Office of the Assistant Chief of Staff for Intelligence, Washington, D. C.
Positions: Stenographer, filing clerk, Top Secret control officer, part-time action officer

Richard G. Stahl
Active duty: May 1967 to May 1970
Rank: Sergeant
Training: Counterintelligence agent
Unit: Chicago Field Office, Region I, 113th MI Group, Chicago, Illinois
Position: Special agent

Ralph M. Stein
Active duty: October 1965 to October 1968
Rank: Sergeant
Training: Counterintelligence agent
Unit: Counterintelligence Analysis Branch, Office of the Assistant Chief of Staff for Intelligence, Washington, D. C.
Position: Domestic intelligence analyst in charge of the Left-Wing/Anti-War Desk

Theodore L. Valand
Active duty: May 1966 to May 1968
Rank: First lieutenant
Training: Intelligence Officer Orientation
Unit: Brooklyn Field Office, 108th MI Group, Brooklyn, New York
Position: Administrative officer